



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Spectrum Analysis & Frequency Engineering

File: B-222635

Date: October 8, 1986

DIGEST

1. Since the General Accounting Office (GAO) decides protests that involve procurements of property or services by a federal agency, the award by a federal agency of a contract to provide the public direct computer access to information on the agency's data base is subject to GAO's bid protest jurisdiction.

2. Protest of award of a contract to provide the public with direct computer access to a copy of the agency's data base is sustained where the agency indicated in a solicitation amendment that three job samples used for the cost evaluation were to be based on transmitting 60 characters per line of data; protester, relying on this amendment, offered a price based on the time needed to transmit 60-character lines of data; and the agency accepted a price from the awardee based on the transmission of fewer than 60 characters per line of data.

DECISION

Spectrum Analysis & Frequency Engineering, Inc. (SAFE) protests the award of a contract to Spectrum Management Systems, Inc. (Spectrum) under request for proposals (RFP) No. 86-03, issued by the Federal Communications Commission (FCC) to provide the public with direct electronic access to a copy of the agency's computer data base on its Master Frequency List for the Private Land Mobile and General Mobile Radio Services. We sustain the protest.^{1/}

^{1/} Subsequent to filing this protest, SAFE brought suit in the United States District Court for the District of Columbia (Civil Action No. 86-2024) to enjoin continued performance by Spectrum pending our decision. The court has stated that it does not desire the suit to interfere with the pendency of the protest and has requested that our consideration of the matter be resolved as expeditiously as possible. See Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1986).

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The solicitation required the contractor to install, service, and maintain a current copy of the FCC data base on an interactive computer system for access by the public through connection to a public telephone network. The access services were to be purchased directly by the public user from the contractor. The RFP specified that offerors were to submit technical and price proposals; under the terms of the RFP, the government would evaluate offers for award purposes by adding 60 percent of their determined technical weight value to 40 percent of their determined cost weight value.

For the price proposal, the RFP required an offeror to furnish both its customer usage charges per second of computer utilization and the number of seconds of computer utilization for each of three sample job models. These three sample jobs were generic in nature in that they included no specific queries using actual values for call sign, name, location, etc., and no description of actual output data. The FCC would conduct the price evaluation by multiplying each offeror's aggregate number of seconds of computer utilization for all three jobs, times the offeror's proposed charge per second of utilization.

The RFP stated that seven lines of data were to be printed for Job 1, 36 lines for Job 2, and 76 lines for Job 3. At a preproposal conference SAFE asked what data was to be displayed for each of these "lines" of output. The FCC gave the following answer to this question: "60 characters of data output from query, which may include items such as data elements, calculations, etc." The same question was asked, and the same answer given, for all three job samples. All the questions raised at the preproposal conference, and the FCC's answers, were set out in an amendment to the RFP.

After evaluation, the FCC determined that the proposals of SAFE and Spectrum were within the competitive range, and requested each company to submit a best and final offer. Although the final technical point scores of both companies were nearly identical, the FCC found Spectrum to have the most advantageous proposal because its evaluated price of \$1.31 for the three sample jobs was lower than SAFE's price of \$1.57. SAFE complains that the subsequent award to Spectrum was improper because Spectrum based its price on transmitting fewer than 60 characters of data per line as SAFE read the preproposal conference amendment to require. Transmitting fewer characters would reduce computer utilization time and, as a result, the evaluated price. SAFE points out that its proposed charge per second of computer use time actually was lower than Spectrum's, and concludes that its evaluated price thus also would have been low had the proposals been evaluated on the same basis.

As a preliminary matter, the FCC and Spectrum argue that SAFE's protest should be dismissed under our Bid Protest Regulations as beyond the jurisdiction of our Office because it involves a nonappropriated fund contract from which the government will derive no direct benefit in terms of services or property; both maintain that there must be a direct benefit to the government under the contract in order for our Office to assume jurisdiction. Spectrum cites our decisions in Cable Antenna Systems, B-220752, Feb. 18, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ 168, and T.V. Travel, Inc., et al.--Request for Reconsideration, 65 Comp. Gen. 109 (1985), 85-2 C.P.D. ¶ 640, as support for this proposition.

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (Supp. III 1985), which provides statutory authority for our Office to decide bid protests, defines a protest as a written objection by an interested party to a solicitation by a federal agency for bids or proposals on a proposed contract for the procurement of property or services, or a written objection by an interested party to the award or proposed award of such a contract. 31 U.S.C. § 3551. Our jurisdiction thus is not dependent upon the expenditure of appropriated funds, T.V. Travel, Inc., et al.--Request for Reconsideration, 65 Comp. Gen. 109, supra, but, rather, extends to all protests involving the procurement of property or services by federal agencies.

All elements necessary to invoke our jurisdiction are present here. The existence of some direct contractual benefit to the government--the consideration Spectrum and the FCC argue precludes jurisdiction in this case--is not set forth in CICA as a prerequisite to our Office assuming jurisdiction of a protest. We conclude that our Office has jurisdiction under CICA to review this protest.

Turning to the merits, it is SAFE's position that the FCC's answers to the preproposal conference questions established a requirement that proposed prices be based on the transmission of 60-character lines of data for each of the three job samples. As SAFE calculates, the minimum possible evaluated price for Spectrum using the fastest possible time for transmitting 60-character lines is substantially higher than SAFE's evaluated price which, again, included the lowest cost per second of computer utilization time. SAFE concludes that the FCC must have evaluated Spectrum's proposed price on a basis other than the transmission of 60 characters per line, and that the FCC thus failed to follow the evaluation criteria and afford offerors the opportunity to compete on an equal basis.

The FCC does not dispute that Spectrum's evaluated price was based on transmitting fewer than 60 characters of data per line. Rather, it takes the position that SAFE erroneously interpreted the RFP as establishing 60 characters per line as a mandatory data transmission requirement. The agency states that 60 characters per line was intended only as a maximum to assure that businesses with older terminals (which print no more than 72 characters per line) would have the capability to use the system. The FCC emphasizes that even if the 60 characters per line statement is viewed as a firm requirement, bidders still would not be precluded from utilizing "communications optimization techniques," common within the communications data processing field, to reduce data transmission time. Use of one of these techniques, "duplicate character suppression" (eliminating transmission of redundant characters, including empty character spaces), is cited by Spectrum as the primary means it employed to reduce the transmission time for Job 3.

We find SAFE's interpretation of the solicitation to be a reasonable one; indeed, we believe it is the only reasonable interpretation. The plain language of the amendment in response to the preproposal conference questions specified that each line of output for the job samples contained 60 characters of "data output," not a maximum of 60 characters. We find no other indication in the RFP that the 60-character lines requirement was intended only as a maximum. The RFP also did not state that data optimization techniques could be used to reduce the number of characters to be transmitted under the samples; did not provide the detailed description of data output that would have been needed to permit an analysis of the effectiveness of any particular character suppression technique; and contained no other indication which we believe should have led offerors to assume that these techniques could be used.

We conclude that, by virtue of its reasonable reading of the RFP, SAFE was unfairly led into calculating longer transmission times and, as a result, higher prices than Spectrum. As SAFE's proposed cost per second of computer utilization time was lower than Spectrum's, it appears that the outcome here could have been different had SAFE been aware of the FCC's interpretation or otherwise had calculated its transmission times on the same basis as Spectrum. By separate letter to the FCC Chairman, we are recommending that the FCC amend the RFP to establish a common basis for evaluation, and permit SAFE and Spectrum to submit modified proposals. In the event SAFE is the low offeror, Spectrum's contract should be terminated and award made to SAFE.

The protest is sustained.

for Harry D. Van Cleave
Comptroller General
of the United States